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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

J. T. CHANRAI (S) PTE. LTD. v. CONSOLIDATED HOTELS LTD.

[O.C.J. (Rajah J.) October 24, 1985]

[Singapore – Suit No. 3497 of 1978]

Contract – Purchase of floor units in multi-storey building – Option to purchase – Exercise of option – Failure to execute agreement attached to option – Whether 10% paid forfeitable.

The plaintiffs, menswear retailers and tailors, paid the sum of $120,647.25 and obtained an Option to buy 2 shop units Nos. G36 and G37 in a multi-storey building called Peninsular Plaza from the defendants, builders and developers. The building was then under construction by the defendants, who were owners of the land at the junction of North Bridge Road and Coleman Street in Singapore. The Option was subject to certain terms and conditions, including the condition that the Sale and Purchase Agreement attached to the Option must be entered into by the parties within two weeks from the date of the exercise of the Option. On March 1, 1978, the plaintiffs duly exercised the Option by payment of the sum of $120,647.25. However, the Sale and Purchase Agreement was not entered into within the two-week period. On June 13, 1978, the defendants notified the plaintiffs that since the plaintiffs failed to sign the Sale and Purchase Agreement, the defendants would forfeit the 10% amounting to $241,294.50 paid by the plaintiffs, thereby giving rise to the claim for the said sum by the plaintiffs.

Held, dismissing the plaintiffs' claim with costs:

(1) the defendants were at all material times ready and willing to comply with the terms of the Option to Purchase and of the terms of the Agreement for Sale and Purchase;

(2) the defendants have not committed any breach of the Option to Purchase;

(3) the plaintiffs have failed to enter into the agreement for the purchase of Units G36 and G37 as required by the Option to Purchase;

(4) on a true construction of Clause 4 of the Option to Purchase the defendants are entitled to forfeit the 10% Deposit Money, namely the sum of $241,294.50 and sell the Units G36 and G37 to any other party.

CIVIL SUIT.

J. G. Advani (*Miss Margaret Neo* with him) for the plaintiffs.

Joseph Grimberg (*Muthu Arusu* with him) for the defendants.

Cur. Adv. Vult.

Rajah J.: The plaintiffs are well-known high quality menswear retailers and tailors in Singapore and the defendants are builders and developers.

The defendants were owners of a prime piece of land at the junction of North Bridge Road and Coleman Street. They wished to develop the said land as a commercial and shopping complex and with that end in view applied in 1973 in the usual way to the Planning Authority for planning permission so to do. The Planning Authority did not approve the application for the reason that the site was not complete in that it was L-shaped. Its requirement was that the plans should incorporate part of St. Gregory Place and the adjacent site (Bata site) owned by Bata Shoe (S) Pte. Ltd. (Bata) Accordingly the defendants on the January 28, 1974 entered into an Agreement with Bata (Exh D9) for the purchase of the Bata site. The said Agreement, more particularly Clause 3 thereof, clearly envisages the carrying out of the Project in two phases, one before the demolition of the building on the Bata site and the other after its demolition. Clause 5 thereof provides for Bata to occupy the ground floor of the 1st Phase of the Project. Clause 5 reads:

> "Consolidated agrees that it shall not proceed to demolish the Bata Building until such time as the new building under construction on Consolidated Land has reached the level of the fourth floor when Bata can vacate the Bata Building and move into the temporary premises as delineated in Green on Plan CF annexed hereto, fronting North Bridge Road consisting of about 7500 square feet in area to enable Bata to continue with its business of sale of shoes on the ground floor of the said temporary

premises. Notice of readiness for temporary occupation by Bata of the said premises shall be given at least three months earlier by Consolidated."

The said temporary premises of 7500 square feet was located on the Ground Floor and was comprised of seven units (DB10 and 11); four of them had a North Bridge Road frontage and of these four units, one unit comprised of G36-G37 had both a North Bridge Road frontage (G36) and as well as a Coleman Street frontage (G37).

Having acquired the Bata site, a fresh submission incorporating the Bata site and part of St Gregory Place was made by the defendants to the Planning Authority in 1975 and this was approved on May 16, 1975 (the Project). A separate submission was then made for the temporary use by Bata of the ground floor and this was approved in August 1975. The approved plan (Exhibit D12) sets out the location of the temporary Bata premises on the Ground Floor.

In 1977 the defendants were engaged in carrying out the 1st Phase Construction of the Project. Construction on the 2nd Phase of the Project was to comprise the development of the Bata site and the completion of the said Ground Floor which had been temporarily occupied by Bata.

Sometime in August 1977 the plaintiffs became interested in the purchase of high class shop premises from where they could carry on their prestigious business of the sale of high quality menswear and tailoring. On August 27, 1977 they submitted a formal application signed by L C Chanrai, the Managing Director of the plaintiff company, to the defendants for the purchase of unit numbers G36, G37, G38 and G39 (area 1500 square feet to maximum 2000 square feet) at a price to be determined. Consequent on this application a meeting was arranged for January 18, 1978 between a Mr. K T Khemlani now deceased (Khemlani), a director of the plaintiff company, acting for and on their behalf and Mr. Lim Chong Chiang (Lim), a director of the defendant company, at the latter's office. Khemlani brought with him to the meeting one Kishen Rubchand Chanderaman (Kishen), the Company's General Manager. The purpose of the meeting was to discuss the plaintiff's said application for purchase of the four unit numbers. At this meeting during which Kishen (PW1) did no talking, Khemlani wanted to buy only the two unit numbers G36 and G37 which fronted both North Bridge Road and Coleman Street. Lim told him that he could not as yet accept any booking for G36 and G37 as their prices had not yet been finalised. He offered Khemlani the basement shops but the latter was not interested in the basement units. Lim in his evidence *inter alia* says :

"Khemlani said he was interested in buying accommodation. He wanted to buy the best shops, site-wise. On January 18, 1978 when Khemlani came to see me he only wanted two units as opposed to four in AB2. He wanted G36 and G37. These were the best units. G37 had two frontages. I told him that at that time we could not accept the booking because our prices had not been finalised yet. I offered him the basement shops. He was not interested in the basement. I told him these two units would be temporarily occupied by Bata. These two units would be in the 2nd Phase construction. On 17.1.78 brochures had been printed. I showed him a brochure (admitted and marked D3). I explained to him the position using the Ground Floor Plans, as shown in the brochure. I told him Bata would occupy the premises for two years. He told me that he could wait for two years. He wanted me to confirm this. At this time booking had not opened. Our meeting lasted half an hour. Because he wanted me to confirm that we would offer him these shops I took him to see Mr. George Chow. Mr. Chow was in overall charge of the project. He occupied the office downstairs. There was another conversation between the three of us. Mr. Kishen was also there. Khemlani did the talking. He wanted us to make a firm commitment re G36 and G37. Mr. Chow explained again to him about Bata's temporary occupation. We told them that we would give them G36 and G37 when the prices had been finalised. Khemlani said he was prepared to wait as he wanted the best shops. I told him that I would contact him when prices were fixed and bookings were to be opened." (Pages 28 and 29 of the Notes of Evidence).

On the meeting of January 18, 1978 George Chow's (DW6) evidence is :

"Mr. Lim (DW1) brought Mr. Khemlani and Mr. Kishen to my room behind the sales office. He told me he had been talking to them. Mr. Khemlani did the talking. Mr. Khemlani said he liked G36 and G37 on the corner of Coleman Street and North Bridge Road. He said Chanrai wanted to purchase the units. This was before formal booking had opened. In reply I offered 27,000 sq ft in the basement. I mentioned to Khemlani that the two units were involved in the Bata Agreement. I told him we had to provide temporary accommodation to Bata. After Bata had moved out then he could move in. I said this would take about two years. He said 'I don't mind to wait. Can I book now and what is the price'. I said 'I cannot accept the booking. I have not fixed the price list yet.' "

These two pieces of evidence are strenuously challenged by the plaintiffs and as Khemlani had died before the commencement of the hearing of this action his vital material evidence on these matters is not available to the plaintiffs. On the meeting of January 18, they have to rely on the evidence of Kishen and to some extent in-

directly on that of Chanrai (PW4), the Managing Director of the plaintiff company who was at all material times away from Singapore.

DW4 the Architect in charge of the Peninsula Plaza Project in his unchallenged evidence says:-

"The temporary premises (for Bata) were completed on 21 February 1978. Just prior to the 21 February, 1978 Bata's own workmen went in to commence decorations of the premises."

Photo No. 4 of Exhibit D2, which is a blow-up of Photo of Exhibit D1, shows that on March 19, 1978 when the photo was taken, Bata signs were clearly visible to passers-by and the uncontradicted evidence of Lim is that these markings were put up some time before February 27, 1978 by the defendants' contractors on his instructions.

Formal bookings for the purchase of units in the Project opened on February 27, 1978 at 10.00 am. Khemlani was then on his own. Kishen was away from Singapore on a buying trip in Europe. On this, Lim's evidence reads :

"On the morning of 27.2.78 I went to the office. We had six persons dealing with potential clients. There was a large scale model of the project. On the walls there were displayed floor plans. This model (in Court) was displayed.

D1 – page 2. On 27.2.78 the Bata signs as appear on page 3 of the Exhibit were already up. The marking was put up sometime before 27.2.78 (Also D4). This was put up by our contractors on our instructions.

I saw Khemlani that morning i.e. 27.2.78 at 10.00 am. I was then on the ground floor. There was discussion re G36 and G37. I explained to Khemlani that these two units would be temporarily occupied by Bata for two years. For payment I told him he would have to pay 40%. I told him that when Bata occupied the premises we could not separate units by brick walls. He said that he would not mind waiting for two years. He asked me for discount not because of the delay. I said all prices were fixed. We had fixed the prices of the units sometime around the 23.2.78. Plans of all the floors were on the walls. I did not take Khemlani to units G36 and G37. I showed him the floor plan of the ground floor and told him that part of the ground floor was to be occupied. A lot of people were in the office. He agreed to purchase these two units and gave me a cheque for $120,647.25 and that was the booking fee (5% of the purchase price)."

Lim and George Chow were busy on that day; so the Option to Purchase, though bearing the date February 27, 1978 was actually signed and witnessed by Khemlani and Lim respectively on the March 1, 1978 (AB4). The signatories for the defendant company were Lim and another. I set out in full the Option to Purchase as it is the prime documentary evidence in the instant case:

" OPTION TO PURCHASE (AB4)

To : Mr K T Khemlani
701 - 706 High Street Plaza
Singapore

Re: Shop Unit Nos G36/G37 (2nd Phase Construction) in Peninsula Plaza under construction at the junction of Coleman Street and North Bridge Road

In consideration of the sum of $120,647.25 being Option Money paid by you to us (the receipt whereof we hereby acknowledge), we hereby grant you this Option to Purchase the above-mentioned premises solely for Retail in men's wear & piece goods, manufacture of men's suits, trousers, shirts and others, at the unit price of $1,450.00 per square foot which total is made up of Dollars Two million four hundred and twelve thousand, nine hundred & forty five only ($2,412,945/-) subject to the following terms and conditions :-

1. This Option shall expire and be of no effect whatsoever unless exercised within two (2) weeks from the date thereof.
2. You may at any time before the expiry date exercise this Option by returning the annexed "EXERCISE OF OPTION FORM" duly signed and witnessed to our Solicitors, Messrs Boswell, Hsieh & Lim of No 17B, Grand Building, Phillip Street, Singapore 1, together with the sum of Dollars One hundred & twenty thousand six hundred forty seven and cents twenty five only ($120,647.25) being balance of 10% Deposit of the Purchase price (Less $120,647.25 Option Money Paid).
3. An Agreement for Sale and Purchase shall be entered into by the parties hereto within two (2) weeks from the date of exercise of this Option.
4. In the event of your failure to exercise this Option in the manner and within the period stipulated above and/or failure to comply with any of the terms and conditions herein, the Option Money and all monies paid herein shall be automatically forfeited and we shall thereafter be at liberty to sell the abovementioned premises to any other party without notice to you and thereafter neither party hereto shall have any claim against the other.
5. This Option is not assignable or transferable unless with the written consent of our Company.
6. Time is of the essence of this Option.
7. A copy of the Agreement for Sale and Purchase (Type A) is attached herein.
8. Area: 1,664.10 sq ft,
Service Charge: $998.48 per month.
Purchaser/s Solicitors: Advani & Hoo

Dated this 27th day of February 1978

Accepted and confirmed the receipt of Sale Agreement Type "A".

Sgd: K T Khemlani 1/3
Signature of Purchasers/s

Sgd: Lim Chong Chiang & Another
Consolidated Hotels Ltd"

The phrase "2nd Phase Construction" after the words "shop unit Nos G36/G37" Lim says was inserted in the document (AB4) on his instruction; he further says that he explained to Khemlani what the phrase meant.

In February 1978 there were two types of agreement for sale and purchase, Type A and Type B. Type A was a standard agreement for the sale of shops and Type B was also for the sale of shops but which required financing. Clause 3 of the Type A Agreement sets out the manner in which the purchase price was to be paid. It reads :

" The purchase price shall be paid by the Purchaser to the Vendor as follows:-

(a) Immediately upon the signing of this Agreement a sum of Dollars ..... ($) equivalent to ten per cent (10%) of the purchase price such sum to include the booking fee (if any) paid.

(b) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the piling work of that portion of the Complex in which the said Unit is situated has been completed a sum equivalent to ten per cent (10%) of the purchase price.

(c) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the foundation work including pile caps of that portion of the Complex in which the said Unit is situated have been completed a sum equivalent to ten per cent (10%) of the purchase price.

(d) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the reinforced concrete framework of the said Unit has been completed a sum equivalent to ten per cent (10%) of the purchase price.

(e) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the brick walls of the said Unit have been completed a sum equivalent to ten per cent (10%) of the purchase price.

(f) Within fourteen (14) days after receipt by the Purchaser of the vendor's notice in writing that the internal plastering of the said Unit have been completed a sum equivalent to ten per cent (10%) of the purchase price.

(g) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the ducting for air conditioning and electrical wiring together with plumbing (excluding fittings) serving that portion of the Complex in which the said Unit is situated have been completed a sum equivalent to ten per cent (10%) of the purchase price.

(h) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the shop front/doors of the said Unit have been completed a sum equivalent to ten per cent (10%) of the purchase price.

(i) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice in writing that the escalators or lifts serving that portion of the Complex in which the said Unit is situated have been installed a sum equivalent to ten per cent (10%) of the purchase price.

(j) Within fourteen (14) days after receipt by the Purchaser of the Vendor's Architect's Certificate (hereinafter referred to as "the Architect's Certificate of Completion") that the said Unit is ready for installation of internal decoration, the Purchaser shall pay to the Vendor the balance of ten per cent (10%) of the purchase price.

Every such notice shall be supported by a Certificate of the Vendor's Architect which shall be accepted without objection or enquiry as conclusive of the fact that the works therein referred to have been completed."

On March 1, 1978 Khemlani, who was again on his own, although Kishen had returned to Singapore on February 28, 1978 from his buying trip in Europe, signed the Exercise of Option Form (AB5) which reads as follows:

" Date -

M/s Consolidated Hotels Limited
c/o Peninsula Plaza Sales Office
Coleman Street
Singapore 6

Dear Sirs

Re: Shop unit No G36/G37 (2nd Phase construction) in Peninsula Plaza under construction at the junction of Coleman Street and North Bridge Road, Singapore.

I/We hereby exercise the Option dated the day of February 1978 granted to me/us by you and agree to abide by the terms and conditions of Sale.

I/we enclose herewith my/our cheque/cash for $120,647.25 being balance payment of 10% of Purchase Price of $2,412,945.00 (Less $120,647.25 Option Money Paid).

Please send the official receipt to me/us at the above-mentioned address.

Sgd. K T Khemlani
Sgd: Lim Chong Chiang Signature of Purchaser/s "
Witness – 1/3/78

On March 1, 1978, however, only $120,647.25 being the Option Money referred to in the Option to Purchase had been paid by cheque and the balance of the 10% deposit of the purchase price namely $120,647.25 was paid through the Purchaser's solicitors to the Vendor's solicitors on March 11, 1978 (AB33). On the same day the plaintiffs' solicitors also purported to exercise the Option to Purchase for the second time on behalf

of the Purchasers. Here again it is to be noted that the phrase "2nd Phase Construction" appears after the words "Shop unit Nos G36/G37" and that documents AB4, AB5 and AB6-24 are plantiffs documents and have been in their continuous possession since March 1, 1978.

It was only on March, 1978 that Mr. Morris Lee of Messrs Advani & Hoo (the Purchasers' solicitors), although the firm had been named as the Purchasers' solicitors on the Option to Purchase, received instructions for the first time from Khemlani to act for the plaintiffs in the sale and purchase of Unit Nos. G36 and G37. On that day and not before they received from Khemlani the said Option to Purchase (AB4), the Sale Agreement Type A (AB6-27) acknowledged by Khemlani on the Option to Purchase as having been received by him and the Exercise of Option (AB5). They immediately wrote to Messrs Boswell Hsieh & Lim (the defendants solicitors) informing them that they were acting for the plaintiffs in the purchase and asking them for title deeds and draft contract for approval. Why they asked for a draft contract is not clear when the Option to Purchase had attached to it the Agreement for Sale and Purchase Type "A". On the March 8, 1978 the defendants solicitors sent them the title deeds requested for but no draft contract for approval was sent with the letter. On March 11, 1978 (AB33) the plaintiffs' solicitors wrote to the defendants' solicitors exercising the Option and sending a cheque for the sum of $120.647.25. They also asked again for the draft contract. On March 23, 1978 (AB39) the defendants' solicitors wrote to the Purchasers' solicitors enclosing the Agreement for Sale and Purchase – in triplicate for the signature of the plaintiffs and return of same to them within two weeks of the date of the letter. This letter, however, was only received by the plaintiffs' solicitors on March 27. On the same day that is to say on March 27, presumably before receipt of the said letter of the March 23 they wrote to the defendants' solicitors "please let us have Agreement for Sale and Purchase immediately for our clients signature." (AB40).

There was then correspondence between the two firms of solicitors, until May 3, 1978 relating to certain minor amendments to the said Agreement for Sale and Purchase, some of which were agreed to and some were not.

On May 3, 1978 (AB56) the plaintiffs' solicitors wrote to the defendants' solicitors as follows:

"This refers to the correspondence herein.

Our attention has been drawn by our clients with respect to the advertisement of Bata which appeared in the local papers last week. Their showroom is on the ground floor and we are requested to get a confirmation from you that your clients have not let Bata into occupation of the above premises which our clients are purchasing from your clients."

In reply (AB57) the defendants' solicitors responded on May 16, 1978 as follows :

"We thank you for your letter of the 3rd instant, upon which we have taken our clients' instructions.

We are instructed to draw your attention that your clients were aware at the time of booking that the above shops will be occupied by Bata as a temporary premises and vacant possession can only be given to your clients on or before December 31, 1980.

We are further instructed to refer to the Option to Purchase duly signed by your clients on the February 27, 1978 wherein the units are being referred under the 2nd Phase of Construction which is scheduled to complete on or before the December 31, 1980."

And to this the response by the plaintiffs on May 20, 1978 (AB58) was as follows :

" This refers to your letter dated May 16, 1978.

The contents of the second paragraph of your said letter have come to our clients as a surprise. We are instructed by Mr K T Khemlani, who signed the Option to purchase the above properties, that at the time of accepting the Option, there was no mention by your clients or their representatives that the above premises would be let or occupied by somebody else and it would not be until December 31, 1980 that possession could possibly be granted to them.

Although our clients have agreed to purchase the above units from your clients and have paid $241,294.50 by way of deposit, the above units have been given to Bata for occupation without our clients' knowledge, notice or consent. This is, to say the least, highly inequitable and improper.

We are instructed that our clients are not prepared to wait for more than two years to have possession of the above premises and your clients are requested to refund the said deposit paid by our clients to your clients together with interest thereon.

An early reply will be appreciated."

To which the defendants' reply on June 2, 1978 (AB60) was :-

"We refer to your letter of the 20th instant.

We are instructed by our clients' Director Mr Lim Chong

Chiang that Mr Khemlani was aware at all material times that our clients had an agreement with Bata company to take over the land and building for demolition purposes. He was informed before and at the time of booking of the units that the Bata site would form part of the Plaza and that Bata would be moving into temporary occupation of a part of the ground floor including the parts comprised in units G36 and G37. At the time of booking your client was shown the part of the ground floor which Bata would be using and in fact at the time of booking renovation was being done on the parts of the ground floor with Bata window panes showing the Bata signs indicating that Bata would be using temporarily the parts of the ground floor.

Your client was fully aware of the fact that Bata would be making temporary use of the ground floor when the Bata Building is demolished. The words '2nd Phase Construction' were accordingly inserted in the Option form, and these words were explained to your client.

Your client was also given a copy of the Type A Agreement and a brochure on which it was clearly shown the portions which Bata would eventually occupy when the entire project was completed.

We are instructed that after payment of the 10% provided for in clause 3 (d) of the Type A Agreement, your client would not be required to make payment until the brick walls of the said units are completed in accordance with Clause 3(e). Our clients say that since Bata is making temporary use of about 7000 sq ft no brick walls to your clients' two units or internal plastering could be done until Bata had vacated and moved back to the parts of the building allocated to them and as shown on the brochure.

We are instructed that your client is not entitled to a refund of the deposit which will be forfeited if your client fails to sign the Sale Agreement within seven (7) days from the date thereof."

and to which the plaintiffs responded by saying (AB62) :

"This refers to your letter dated June 2, 1978, on which we have taken our clients' instructions.

Our clients' representative, Mr Khemlani, denies the second paragraph of the said letter. He was never informed of the facts as stated therein.

Had he been told and shown the part of the above units that Bata would be occupying until 1980, as alleged, he would never have agreed to purchase the above units and the present impasse would not have arisen. There were no Bata signs anywhere at the time of booking and he was not informed of the meaning of the '2nd Phase construction' or Type A Agreement.

We are instructed that our clients are not prepared to wait until 1980 to take possession of the above premises and, if the deposit paid herein is not returned to our clients, then our clients will have no alternative but to commence proceedings against your clients for the recovery of the same."

To this, the defendants finally responded on June 13, 1978 by saying (AB63) :

"We thank you for your letter of the 12th instant, contents of which have been communicated to our clients. We shall revert to you in due course.

In the meantime, we are instructed by our clients to inform you that since your clients have failed to sign the Agreement for Sale and Purchase, they will now forfeit the 10% deposit which your clients have paid, namely the sum of $241,294.50. They will also proceed to sell the above premises to any interested purchaser."

It is in these circumstances that the plaintiffs commenced these proceedings for the recovery of the said $241,294.50, interest thereon and further or other relief.

The plaintiffs in their Statement of Claim say that they were and remained at all material times ready and willing to comply with the terms of the said Agreement for Sale and Purchase and allege :

(i) that it was a term of the said Agreement for Sale and Purchase that they would take possession of Units G36 and G37 14 days after receipt by them of the defendants' Architects Certificate of Completion;

(ii) in the alternative that it was a condition and/or an implied term of the said Agreement for Sale and Purchase that vacant possession of Units G36 and G37 would be given to the plaintiffs on completion of the construction of the units and/or in the event of constrution having been completed, upon the execution of the agreement for sale;

(iii) that by reason of the events which have happened the defendants were in breach of the express and/or implied terms of the said Agreement for Sale and Purchase, more particularly of the condition or implied term as to vacant possession of Units G36 and G37

(iv) that the defendants repudiated the said agreement which said repudiation the plaintiffs have accepted and that by reason thereof the plaintiffs have suffered loss and damage in the sum of $241,294.50,

(v) that in the alternative by reason of the events which have happened they are entitled to the return of the sum of $241,294.50

(vi) that in the further alternative if, which they deny, no agreement was concluded between themselves and the defendants, they are entitled to the return of the said sum of $241,294.50.

In response to the plaintiffs' claims and allegations the defendants say:

"the plaintiffs knew at all material times that there were to be two phases in the building construction of the Project, the first phase being the one before the demolition of the building on the Bata site inclusive of a part of the ground floor premises for the temporary occupation by Bata and the second phase being the other after the demolition of the building on the Bata site."

and contend :

(i) that it was a term of the Type A Agreement that purchasers would only take possession of Units G36 and G37 within 14 days after receipt by them of the defendants' Architects' Certificate of Completion, which could only be issued under Clause 3(f) of the said Agreement when the two units were ready for installation of internal decoration, at which time vacant possession of the two units would be given to the plaintiffs to enable them to decorate the units.

(ii) that it was not agreed at any time that the plaintiffs could have vacant possession of the two units upon execution of the Type A Agreement, on the ground that so long as Bata was in temporary occupation of the Ground Floor units the defendants could not construct the brick walls of the two units in accordance with the provisions of Clause 3(e) of the said Agreement.

(iii) that the plaintiffs were fully aware during their discussions with representatives of the defendants that they would only be required to pay up to 40% of the sale price on signing of the Type A Agreement and that the balance of the sale price would only be paid after Bata had vacated their temporary premises in December 1980 and the defendants or their architects could then issue certificates requiring further payments under the provisions of Clause 3 of the Type A Agreement.

(iv) that the plaintiffs were not at all times ready and willing to comply with the terms of Type A Agreement, and

(v) that in the events which have happened they were entitled to forfeit the deposit monies paid by the plaintiffs, and that they were not in breach of any express or implied terms of the said Agreement.

To get this case into proper focus I think it will be useful if I deal with two events, namely the meeting of January 18, 1978 and what has been referred to as the Formal Bookings of February 27, 1978, which took place before the actual signing of the Option to Purchase and the Exercise of Option on March 1, 1978.

Meeting of the 18th January 1978

This meeting may be divided into two parts – the first part when those present thereat were Khemlani, Kishen and Lim; the second when the three went together to George Chow's (DW6) office to see him. It was during the first part of the meeting that Lim says that he informed Khemlani that Units G36 and G37 would be temporarily occupied by Bata for two years and that these two units would be completed during the 2nd Phase Construction of the Project when they would become available for occupation by the plaintiffs. Khemlani wanted confirmation of this and hence the joint approach to George Chow, the director in overall charge of the Project, whose evidence confirmed what Lim says he had said previously to Khemlani.

On the plaintiffs' side the only persons who could have testified as to what was or was not said during the first part of the meeting were Khemlani and Kishen. Unfortunately for the plaintiffs, Khemlani died some time before this case came on for hearing thus leaving Kishen as the only person who could testify for them on this aspect of their case. His evidence-in-chief on the meeting of January 18, reads :

"Meeting on 18.1.78 at the site office of the project. Mr Lim, myself and Khemlani were at the meeting. Mr Anand was not there. They offered us the basement about 27,000 square feet. We told them we only wanted 1500 to 2000 square feet. They said O.K. and would call us again. I went on 28.1.78 on a buying trip to Europe. I returned on 28.2.78." (Page 2 of N/E).

In his cross-examination he has this to say :

"18.1.78 – Meeting. Site office opposite the Hotel. Entrance across the road. There was a model of the whole project. It might have but I did not know.

Q : There were panels all around the office showing the various units on the various floors –

A : I can't say whether I noticed them. I knew what I wanted. I can't say that I can recognise Mr George Chow. There were girls in the office.

Q : The discussion lasted one hour –

A : I can't say. The meeting was in the afternoon. Site office upstairs and downstairs. Meeting took place downstairs. Mr Chanrai must have got the numbers from Mr Anand. Somebody there on behalf of the

defendants said that the basement is now open for booking, but the ground floor is not. I don't remember whether I asked when the project would be completed. I don't remember asking when we could move in for occupation. Khemlani did not ask whether there would be other men's shop there. I can't remember whether the price was asked. We were told that the policy was to limit the type of allocation." (Page 4 of the Notes of Evidence).

All this evidence which has a 'I can't remember approach', was, I suppose, intended to mean, that he did not hear anything on that occasion about Bata occupying temporarily the ground floor. However, when he was being re-examined by Counsel he is more positive when he says "we (meaning himself and Khemlani) were not informed of the occupation of Bata at any time prior to our purchase." (Page 6 of N/E). It therefore becomes necessary for me to determine whose recollection, as between Kishen and Lim, of what was said and not said at the first part of the meeting approximates to the truth.

I will now deal with Kishen. His testimony that "we were not informed of the occupation of Bata at any time prior to our purchase" can only in the light of the evidence adduced in this case be read as "we were not informed of the occupation of Bata at any time during the meeting of January 18, 1978" for the reason that on the day of the Formal Bookings he was away in Europe on a business trip. In his evidence Kishen says:

"I went on 28.1.78 on a buying trip to Europe. I returned on 28.2.78. I heard from Mr Khemlani that we had bought the premises at the project (Option to purchase 27.2.78). Two units – G36 and G37 (about 1690 sq ft). These units were on the ground and were within the units G36 and G39 (see AB10). The premises were boarded up after some time. I could not see what was going on. There was a hole in the boarding. I peeped through it and saw some work going on inside as if a shop was being fitted up. I was shocked and curious. I went in and asked what is going on. Who is moving in. The workers informed me that this is going to be a Bata Shop. This included the areas the plaintiffs were buying. I brought this to the knowledge of Mr Khemlani. Khemlani had been working for the Chanrai group since 1969. He was in charge of retail stores in 1977. The next day Mr Khemlani and I went to see what was going on. Mr Khemlani said he would contact Mr Lim and find out what was going on. I noticed these happenings within a month of my return to Singapore (28.2.78). I went in to ask the workers round about 28.3.78. Mr Khemlani tried to get Mr Lim but was not successful for about a week. Mr Khemlani then informed that Mr Lim told him that he had informed Mr Khemlani that these premises were temporary for Bata and that Mr Lim had informed Mr Khemlani of this prior to the purchase. Mr Lim said that now we could pay 40% of the purchase price and the balance of 60% when possession was given to us. This was the first time he had learnt about the 40% payment being made. In April 1978 there was an announcement by Bata that they would be opening at Peninsula Plaza, Ground Floor. Bata occupied the premises in May or June 1978."

In assessing the creditworthiness of Kishen I have to take into account the evidence of the Architect (DW4) and that of the Photographer (DW3) both of whose unchallenged evidence I accept. The Architect says : "The temporary premises were completed on 21.2.78. Just prior to 21.2.78 Bata's own workmen went in to commence decorations on the premises (meaning the ground floor)".

The photographer (DW3) says:

"I was instructed by contractors to take photographs every month –

D1 – Dates were written by me at the bottom right hand corner. These dates show when the photos were taken.

D2 – is a blow-up of some of the photos in D1. Dates at bottom right hand corner were also written by me."

It is clear from the Architect's evidence that Bata's workmen were on the Ground Floor on or before February 21, 1978 decorating the premises and this was at least some 7 to 8 days prior to the return of Kishen to Singapore on February 28, 1978. It is apparent from Photo 4 of Exhibit D2 that the Bata signs were clearly visible to passers-by on or before March 19, 1978, the date when the photograph was taken. This being so the evidence of Kishen as to his doings after his return becomes highly suspect, particularly that relating to his discovery of Bata's occupation only on March 28, 1978 and to that of the joint visit of himself and Khemlani to the site on February 29, 1978. I am satisfied that Kishen had he been as vigilant in the affairs of his employer as he says he is would have known that Bata's workmen were on the Ground Floor working on the decoration some time soon after his arrival on February 28, 1978 from his buying trip in Europe and that he would have communicated his discovery to Khemlani immediately.

The curious thing about this case is the quite unexpected and somewhat bizarre behaviour of Khemlani. A number of questions regarding his conduct in this affair arise – (1) why did he sign the Option to Purchase without consulting the plaintiffs' solicitors M/s Advani & Hoo, even though in the Option to Purchase he had named them as the company's solicitors; (2) why did he only instruct his company's solicitors on March 6,

and not before; (3) why did he not carry out Chanrai's instructions on April 10, 1978, of which more later, and (4) why did he not keep Chanrai fully in the picture as to what he was doing in Singapore.

From Chanrai's (PW4) evidence, which I unreservedly accept, it appears to me that Khemlani was trying to give the impression to Chanrai that he was in consultation with his lawyers throughout this deal. Chanrai says, "He (Khemlani) advised me when the payment was made and that he had obtained a draft contract and that he had instructed Kumar Lal to act on our behalf." In truth Khemlani had not consulted his Company's solicitors when he made the payment, nor when he obtained the draft contract nor when he exercised the Option to Purchase, all of which were serious matters to his employers. Further Khemlani misled Chanrai when he informed him that he had instructed Kumar Lal to act on his behalf. In fact the evidence was that it was Morris Lee whom Khemlani had instructed and that too for the first time on March 6, 1978; Kumar Lal did not come into the picture until late in March 1978. Not only did Khemlani withhold vital information from Chanrai but he also failed to carry out Chanrai's firm instructions. "My firm instruction to Khemlani on 10.4.78 was not to proceed if Bata was going into occupation" said Chanrai in his evidence (Page 18 of the Notes of Evidence) And what did Khemlani do about the firm instruction. And on this Kumar Lal's (PW3) evidence is :-

"On the 10 April, Mr Khemlani rang me up and told me that he had not received the letter of confirmation as promised (from the Defendants) and he told me that the renovations by Bata were proceeding very fast and he invited me to visit the site with him. We met on the site on the April 11, and there we both saw the renovations going on the premises. We asked someone there ostensibly in charge and he told me that Bata was renovating the premises and would be moving in soon to commence business. I told Mr Khemlani he should instruct us to take up the matter. He asked me to hold on till the letter comes. I got instructions from my client on the 3 May, 1978 to take up the matter with the developers." (Page 10 of the Notes of Evidence).

On this aspect of Khemlani's inaction Counsel for the defendants submitted that "Khemlani did not carry out Chanrai's instructions on April 10, 1974 because he felt he could still retrieve the situation". The truth of the matter, however, is that the situation on April 10, 1978 was well past retrieval and this is borne out in Khemlani's Instruction Note to the plaintiffs' solicitors dated June 21, 1978 (Exhibit P8) on page 2 para 3 where he says: "On the 6 April, 1978 there was an advertisement in the *Straits Times* by Peninsula Plaza (that is the defendants) for investment opportunities in the Complex where they mentioned that Bata was on part of the Basement, Ground and First Floors *etc.*"

In this case it cannot be disputed that the defendants had a contractual and planning approval commitment to Bata and the Planning Authority respectively for some parts of the Ground Floor to be used as temporary premises for Bata until some time during the 2nd Phase Construction of the Project. With the best will in the world it would not have been possible for the defendants to let the plaintiffs into occupation of G36 and G37 during the 1st Phase Construction without the defendants being in breach of their contract with Bata and more importantly in violation of the permitted use of the Ground Floor by the Planning Authority in favour of Bata. I do not believe that the defendants would have had the temerity to allow the plaintiffs immediate occupation of G36 and G37 and so fly in the face of the Planning Authority and thus perhaps, not only incur its displeasure but also put in jeopardy the smooth constructional progress on the Second Phase of the Project.

On the evidence before me and for the reasons stated above I am satisfied (1) that when Kishen said "We were not informed of the occupation of Bata at any time prior to the purchase" he was not being truthful and (2) that when Khemlani signed the Option to Purchase on March 1, 1978 without consulting the plaintiffs' solicitors he well knew that he could not go into immediate occupation of G36 and G37 until after Bata had moved out of the Ground Floor into their permanent premises which would have been sometime during the construction of the second phase of the Project. As to why Khemlani, a businessman of his undoubted experience and acumen, should have acted in the bizarre manner in which he did, seems to me inexplicable. However I am satisfied on the evidence before me that, for some reason best known to himself he did not keep Chanrai fully in the picture as to (1) the occupancy of G36 and G37, (2) signing of the Option to Purchase, (3) the paying of the Option Money and (4) the exercising of the Option to Purchase all of which happened on or before March 1, 1978.

Of Khemlani, Chanrai very generously says that "he was an old and trusted employee" (Page 16 of Notes of Evidence) and the evidence before me is

also that "Khemlani resigned as director of the Company in September/October 1978" and that "after resignation he went to Kuala Lumpur to set up his own business" (page 5 of Notes of Evidence).

With regard to the second part of the meeting of January 18, 1978 keeping in view what I have said and found in regard to the first part of the meeting, I do not think it necessary for me to say anything more.

Formal Bookings of the 27th February 1978

On the evidence before me I am satisfied that at the time when Khemlani formally booked Units G36 and G37 he was aware that Bata would be temporarily occupying part of the Ground Floor which included these two units.

Having made the findings as set out above I now turn to the remaining aspect of the instant case, that is to say the Option to Purchase, the Exercise of the Option and the Agreement for Sale and Purchase annexed to the Option to Purchase. It is not disputed that any agreement for the sale and purchase of Units G36 and G37 had been signed by the parties when the plaintiffs asked for repayment of the Deposit Money and the defendants refused the repayment on the ground that the Deposit was, in the circumstances of the case, properly forfeited to them under the Option to Purchase and yet the only other ground of the plaintiffs' case against the defendants proceeds on the basis that an agreement for sale and purchase of Units G36 and G37 had been signed between the two parties, which never did happen.

The plaintiffs through their authorised person signed the Option to Purchase. On the signing of the Option, the Option Money of $120,647.25 was paid. The Option was to be exercised within two weeks of the date of the Option which the plaintiffs did on March 11, 1978 and paid the sum of $120,647.25 thus making up the sum paid to the defendants to 10% of the purchase price. An agreement for the sale and purchase had under the Option to Purchase to be signed within two weeks of March 11, 1978 otherwise under Clause 4 of the Option to Purchase the Option Money and all monies paid shall be automatically forfeited and the vendors (defendants) were to be at liberty to sell Units G36 and G37. Both the defendants and plaintiffs never signed any agreement and these two units have now been disposed of. In the events that have happened in this case I find :

(1) the defendants were at all material times ready and willing to comply with the terms of the Option to Purchase and of the terms of the Agreement for Sale and Purchase Type A;

(2) the defendants have not committed any breach of the Option to Purchase;

(3) the plaintiffs have failed to enter into an agreement for the purchase of Units G36 and G37 as required by the Option to Purchase, and,

(4) that on a true construction of Clause 4 of the Option to Purchase the defendants are entitled to forfeit the 10% Deposit Money, namely the sum of $241,294.50 and sell Units G36 and G37 to any other party.

I am indebted to both counsel for the very careful presentation of their respective clients' cases and to the number of cases cited by them. In the view I have taken of this case it is, I believe, not necessary for me to advert to any of them.

It remains now for me to dismiss the plaintiffs' claim with costs.

Order accordingly.

Solicitors: *Advani Hoo Morris & Kumar; Drew & Napier.*

SUPREME HOLDINGS LTD. v. THE SHERIFF, SUPREME COURT OF SINGAPORE & ANOR.

[O.C.J. (Thean J.) March 14, 1986]

[Singapore – Originating Summons No. 813 of 1985]

Landlord and Tenant – Distress – Writ of, and winding up order against tenants – Competing claims of landlord and the Liquidator – Scope of Distress Act (Cap. 20), s.20(1) and Companies Act (Cap. 185), ss. 334 & 335(2).

Distress – Obligation of Sheriff – Effect Court would give to Distress Act (Cap. 20), s. 20(1).

Companies – Limitation of Companies Act. (Cap. 185), s. 335(2).

On April 23, 1985 the movable property of Peter Chew's Pte. Ltd. was seized by the Sheriff pursuant to two Writs of Seizure and Sale taken out by two creditors. The landlord/applicants on April 25, 1983 then applied for and obtained a Writ of Distress against their tenants Peter Chew's Pte. Ltd., for recovery of arrears of rent and service charge due from the tenants for 6 months.

On April 27, 1985 another creditor Hin Seng Pte Ltd. petitioned for the winding up of the tenants. On July 26, 1985 a Winding Up Order was made against the tenants, and the Official Receiver was appointed the Liquidator of the tenants.